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Comments of
AMERICAN TRUCKING ASSOCIATIONS
On
**DRIVERS HOURS OF SERVICE;
SUPPORTING DOCUMENTS**

FHWA Docket No. 98-3706 - 33
Federal Register [Vol. 63, No. 75]



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FOREWORD


The American Trucking Associations (ATA), with offices located at 2200 Mill Road, Alexandria, Virginia 22314, is the national trade association for the trucking industry. Through our affiliated trucking associations located in every state and the District of Columbia, and their more than 30,000 motor carrier members, fourteen affiliated conferences, and other organizations, ATA represents every type and class of motor carrier in the country.


ATA's highest priority is highway safety. That priority is reflected in the many safety initiatives we have developed or supported over the years including the cooperative Federal-State truck safety grant program (the Motor Carrier Safety Assistance Program), the Commercial Driver's License program, the drug and alcohol testing requirements for truck drivers, the radar detector ban, anti-lock brake systems, and many others.

The ATA Safety Policy Department is charged with developing and promoting safety policies consistent with the industry's safety priorities. The department also has the responsibility of reviewing legislative and regulatory actions proposed by any jurisdiction within the United States on issues that will affect the trucking industry. The department solicits industry views and develops and submits, in rulemaking proceedings, comments reflecting trucking industry policy. It has also submitted comments to final rules and petitions for regulatory amendments to enhance safe motor carrier operations and overall highway safety. Also, the department develops materials and programs which assist motor carriers in meeting their responsibilities for regulatory compliance and safe operations.

ATA files these comments in response to the Federal Register Notice of Proposed Rulemaking (NPRM), Docket No. FHWA-98-3706, RIN 2125-AD52, April 20, 1998, Volume 63, No. 75; Department of Transportation, Federal Highway Administration (FHWA) regarding Hours of Service of Drivers; Supporting Documents.

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1. INTRODUCTION

In its Notice of Proposed Rulemaking, resulting from a requirement in the Hazardous Materials Transportation Authorization Act of 1994 (the Act), the Federal Highway Administration (FHWA) has proposed two options for motor carriers to verify their drivers hours of service (HOS) as reflected on the drivers record of duty status (RODS). The basic approach proposed will allow a motor carrier to create a self-monitoring system which will utilize supporting documents that the motor carrier identifies in a written plan. If the self monitoring system is “effective” in deterring noncompliance with HOS through verification of the RODS, only those records that the motor carrier identifies in the written plan will be required to be retained. Otherwise, if the self-monitoring system is deemed to be ineffective, or no self-monitoring system is established by the motor carrier, FHWA proposes that the motor carrier is required to retain all supporting documents for all drivers. These records are identified by FHWA in the proposal as any documents generated by the motor carrier in the normal course of business which are used, or could be used as generated or modified, to verify driver location and/or activity.

In order to effectively represent the industry on this proposal, ATA sought and received the views of a wide range of motor carriers. We heard from many trucking companies in different segments of the industry--the less-than-truckload (LTL) segment, truckload (TL) carriers, tank truck carriers, household goods (HHG) companies, and private carriers: Several themes were recurrent across the industry--the HOS rules need to be revised first before regulatory monitoring systems are specified and, no matter how good their present systems are for verification of HOS and RODS, carriers cannot meet the requirements of this proposal because, in the ordinary course of their businesses, they do not generate the types of documents and information suggested in this rulemaking.

Although ATA has strong feelings about these and other issues raised by this proposal, the most fundamental issue of concern is the first one mentioned above. **This proposal is very premature. By advancing this proposal before making fundamental changes to the HOS rules, FHWA has put the cart before the horse. The HOS rules need to be fundamentally changed**

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first. These issues, the premature nature of this rulemaking and the need for fundamental changes to the HOS rules, are addressed initially below.

Subsequent to addressing these more fundamental issues, ATA's comments focus on the assumptions underlying the proposal and some specific elements of it that deeply concern the trucking industry as follows:

1. The rule is premature;
2. The HOS rules need to be changed fundamentally;
3. Self-monitoring is the right approach;
4. Current systems do not meet the proposed requirements;
5. Neither proposed option meets the statutory mandate of reasonable cost;
6. FHWA has failed to define and "effective" self-monitoring program
7. FHWA needs to better define "supporting document;"
8. Record sampling during compliance reviews should be performed using statistically significant methods;
9. FHWA needs to adjust the retention period for supporting documents and RODS;
10. FHWA's proposal favors use of electronic systems;
11. FHWA should consider other methods of collection and verification;
12. FHWA should increase driver responsibility; and
13. FHWA needs to further study the independent contractor and toll receipt issue.

II. THE RULE IS PREMATURE

ATA submits that any HOS verification proposal is **premature** until FHWA has completed its intended revisions of the HOS rules. This effort is a multi-year process that has been underway for more than a year. In fact, ATA is eagerly anticipating the next step in the process, a Notice of Proposed Rulemaking (NPRM) scheduled to be published in the Fall of this year. In June, 1997, ATA submitted comprehensive comments to the HOS docket (FHWA Docket No. MC-96-28), as a result of the agency's Advance Notice.

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Clearly, it is very difficult to anticipate what verification and recordkeeping system will be appropriate because the trucking industry does not know what underlying system it will be verifying, and what a reasonable monitoring system might be. It is absolutely essential that FHWA address the basic rules governing hours of service of drivers before deciding on the system or systems that should be used to verify compliance with these rules. The results of two industry surveys conducted by affiliated conferences were unanimous on this issue. And, as many of us continue to probe the issues of fatigue management and HOS, we find less of a connection between strict compliance with prescriptive hours of work rules and driver alertness.

It is interesting to note that FHWA has apparently contemplated this issue as well. Under the “Supplementary Information” section of the proposal (see 63 FR No. 75 pg. 19457-19467), FHWA suggests that it will “likely incorporate this NPRM. ..into the upcoming NPRM for RIN 2125-AD93.” This is the regulatory identification number for the open HOS docket. We strongly urge FHWA to follow its own inclination to merge the two rulemakings.

III. THE HOS RULES NEED TO BE CHANGED FUNDAMENTALLY

As the regulators and the industry alike have recognized, the HOS rules themselves need to be addressed in a very fundamental way. In fact, recent and ongoing fatigue research suggests that compliance with HOS rules do nothing to manage fatigue. They simply regulate work time using a “one size fits all” approach.

In a recent paper entitled, “**Three Fatigue Management Revolutions for the 21st Century,**” FHWA researcher, Ronald Knipling, states: “Prescriptive rules, no matter how good, encourage the management of **hours of work** as opposed to the direct management of *fatigue and alertness*” (Knipling, 1998). While it is necessary to move forward and take the next step of correcting the prescriptive HOS rules for the near term, Knipling suggests that, eventually, FHWA will move to either a carrier-based or driver-based fatigue and alertness management program. He states: “FHWA is interested in pursuing process and outcome-based alternatives to prescriptive HOS.” Based on FHWA’s own belief that the industry must eventually turn to true fatigue management systems,

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FHWA's stated assumption in the supporting documents proposal that adherence to the current prescriptive HOS rules equals safe and alert drivers is flawed.

ATA knows it will have additional opportunities to comment on changes to the HOS rules; however, we would like to share some of the industry's thoughts regarding the fundamental changes to the HOS rules that are needed.

The HOS rules must better regulate fatigue. The future HOS rules must not just dictate hours on and off duty, rather they must promote the practice of fatigue management. In order for this to occur, the future rules must be based on sound scientific research. Concurrently, however, the rules must address the needs of a 24-hour-per-day, 7 day-a-week society. Society demands that goods be delivered without interruption. Therefore, the rules must not only promote safety, but they must also be cost-effective and address the needs of our society.

As the agency has heard many times, the current rules are outdated and do not provide sufficient flexibility for some carrier types to effectively operate in today's economy. Among other factors, just-in-time (JIT) delivery, improved vehicle design, and better roads have all combined to change the ways motor carriers operate. Future HOS rules must provide additional flexibility and must reflect 21st century operations.

Strict adherence to the current HOS regime may actually promote driver fatigue in some operations. While studies have proven that humans operate on a 24-hour body clock, current rules ignore this fact and force drivers to stop driving at times when their bodies are ready to go. They also allow drivers to drive when their bodies are telling them that they may not be ready for the task. It has become clear that future HOS regimes should promote a work/rest cycle that equals 24 hours to address the body's natural circadian rhythm.

Future HOS rules should also be structured to provide drivers adequate rest and recovery times that have scientific support. The new rules should allow a period of rest that lets drivers restart their clocks. According to the research, this period of time should be of sufficient duration to eliminate any accumulated sleep deficit.

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The industry has many additional thoughts and ideas about future HOS rules. The above thoughts, and others, will be expressed much more comprehensively in industry comments to the upcoming HOS proposals. However, ATA again urges FHWA to address the underlying HOS rules before specifying regulatory supporting documents systems. Even though the instant NPRM on supporting documents is premature, in the remainder of this document ATA will address some specifics of the proposal.

ATA supports FHWA's conceptual approach to this rulemaking. Motor carriers should have the ability to institute individualized self-monitoring systems that assist them in managing fatigue. However, the proposal is premature and contains several proposals which are cause for concern

IV. SELF-MONITORING IS THE RIGHT APPROACH

ATA supports FHWA's conceptual approach to verifying HOS compliance. As FHWA proposed, motor carriers should have the ability to institute individualized self-monitoring systems for verification of compliance with the hours of service (HOS) as reflected on the records of duty status (RODS). The trucking industry is incredibly diverse. And, while many carriers develop or generate similar documents in the normal course of their businesses, it is probably impossible to craft a regulation outlining specific types of supporting documents that must be used by all companies.

We also agree with Federal Highway Administration's (FHWA) supposition that any "effective" system should place the emphasis on finding excess hours, and not just compliance with the paperwork associated with HOS. For too long, FHWA's enforcement approach has been focused on verifying the paperwork associated with rules that may or may not impact safety. The agency must continue to measure and assess safety performance. Simply put, an "effective" monitoring system should address a carrier's management of driver fatigue and alertness because that's what impacts highway safety. That's why it's critical for the agency to **first** change its HOS rules.

However, given that the current proposal addresses existing HOS rules, we will discuss the elements of an "effective" self-monitoring system later in these comments.

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V. CURRENT SYSTEMS DO NOT MEET PROPOSED REQUIREMENTS

Throughout the docket, FHWA makes false assumptions that current supporting document collection activities meet the proposed requirements. For instance, FHWA states that it believes:

“that responsible motor carriers have already developed self-compliance or self-monitoring systems and have these systems in place. The FHWA does not believe it should impose additional stringent record collection and maintenance requirements on carriers and drivers, when most motor carriers already have such systems and are successfully monitoring and enforcing the regulations.” [FR Vol.63, No. 73, 19459, 4/16/98].

While we certainly agree that many carriers have systems in place to verify HOS and RODS compliance, and that these systems are performing adequately within today’s requirements, virtually none of these systems would be viewed as effective based on the proposals in the rulemaking. And, in order to convert them to meet the proposal, an unreasonable amount of resources would have to be expended. Therefore, as described later below, requiring motor carriers to implement the self-monitoring system in the proposal is inconsistent with the requirement under section 113(b)(2) of the Act “to allow verification of the accuracy of such documents at a reasonable cost, to the driver and the motor carrier.”

The single most troubling aspect of the proposed requirement is the need for documentation to verify beginning and ending on-duty and/or driving times. In most cases, it is nearly impossible to accomplish this task. For instance, there is no beginning or ending documentation for a driver who begins and/or ends their day at a truck stop, rest area, or their home. It is not unusual for over-the-road (OTR) drivers to go for days at a time without entering a terminal or other point where documentation is produced that would verify beginning or ending times.

Additionally, it is very unclear as to exactly which times FHWA wants to verify. Does FHWA intend that the documentation verify: 1) beginning and ending of each period of on-duty and/or driving time; 2) beginning and ending of each trip, regardless of the number of days it takes for the driver to report to his/her home terminal; or 3) beginning and ending of each “day?” Collection of information to verify any of these scenarios poses problems the motor carrier may not be able to overcome.

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Although intermediate documentation is the most plentiful, it too presents problems. Many documents that are used to verify HOS information entered on the RODS contain inaccuracies. The problems associated with certain carrier-generated internal documentation is discussed in more detail in section VIII. However, externally-generated documents such as pre-stamped toll and fuel tickets, in some cases display the date and time of stamping, and not the actual time the bridge, tunnel, or road was traversed, or the time the vehicle was fueled. Meal receipts often do not contain the basic information required, and times indicated on roadside inspection reports are, at best, approximations. For a number of carriers, these types of documents are their only sources of verification and, even though they are not precise, these documents provide enough information in their present form to paint an adequate picture of their drivers' activities. The fact is, the way in which receipts are produced is not going to change. Therefore, carriers are and will be required to work around their deficiencies. Because carriers know what best "fits" their operations and what best controls HOS, FHWA must allow carriers to have the ability to designate documents that work for their operations.

A substantial amount of time and money will have to be spent in attempt to bring even the most advanced carrier into compliance with the verification system proposed by FHWA in this rulemaking. Motor carriers just do not collect the documentation necessary to verify beginning, intermediate and ending times because, in many instances, the documentation simply does not exist. Documents collected in the normal course of business have been found to be inadequate for the purpose of verification, even when used internally for charting the progress of drivers. And, above all, we do not know what future HOS rules hold for motor carriers, except for the fact that they will probably be different than the HOS rules in effect today. Consequently, FHWA's assumption that present systems meet the proposed requirements is inaccurate and FHWA must address both the supporting documents and the HOS issues as one.

Moreover, by ignoring these significant burdens, FHWA has failed to comply with the requirements of the Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act, 5 U.S.C. section 601 et seq. (1996) (the Act). The Act requires government agencies to conduct, and make public when it proposes a rule, an analysis of the number of small entities affected by the proposed rule, a description of the impact of the rule, and a description of alternatives which minimize "any significant impact" on small entities [5 U.S.C.,

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section 603(c)]. FHWA has failed to comply with these requirements. Because of the significant economic impact of FHWA's proposal on the thousands of small trucking companies that would be subjected to it, FHWA must comply with the Act before a rule can go into effect.

**VI. NEITHER PROPOSED OPTION MEETS THE STATUTORY MANDATE OF
REASONABLE COST**

The Act requires that FHWA issue a rule on "supporting documents that must be retained by a motor carrier so as to allow verification of the accuracy of RODS at *a reasonable cost, to the driver and the motor carrier, of record acquisition and retention.*" (emphasis added). Yet, the current proposal would mandate a substantial enlargement of the paperwork required to be acquired and retained by the drivers and carriers, and significantly increase the paperwork costs of the HOS rules, for no apparent safety benefit. As ATA noted in separate correspondence to the Office of Management and Budget about this proposal (see attachment), FHWA has seriously underestimated the paperwork burden (and associated costs) that would be imposed by the proposal.

The proposal does not satisfy this statutory mandate. With respect to the proposed self-monitoring system, the required documentation substantially exceeds the record retention practices of motor carriers today, particularly the proposed requirement to procure and retain records documenting the start and end times of each trip, and will significantly increase the record acquisition and retention costs of the rule. And, with respect to the requirements for carriers that do not have an effective self-monitoring system, the proposal unreasonably contemplates that a motor carrier collect and retain all supporting documents coming into its possession. Given the breadth of the proposed definition of "supporting documents" to include any document that could be used to verify RODS, the proposal to retain "all" such documents would impose an astonishing recordkeeping burden that cannot possibly satisfy the statutory requirement for a reasonable cost.

VII. FHWA HAS FAILED TO DEFINE AN “EFFECTIVE” SELF-MONITORING PROGRAM

As noted above, FHWA’s self-monitoring approach is an appropriate way to implement a supporting documents rule under the current HOS regulations. However, FHWA has failed: 1) to provide a definition of an “effective” self-monitoring system; and 2) to identify who makes the decision that a self-monitoring system is effective. These are critical oversights that must be addressed.

In order for FHWA to ascertain whether or not a system is “effective,” there must be an objective measurement, such as measuring a particular system’s performance against an established percentage threshold. For example, an effective self-monitoring program should be one that, upon close scrutiny, produces less than 10 percent critical HOS violations. If the auditing of HOS and its supporting documentation is conducted in a statistically significant way, and certain drivers are not targeted, then a system that prevents drivers from committing critical HOS violations 90 percent of the time should be deemed effective.

In no instance should a self-monitoring system’s effectiveness be based on how well the paperwork is completed or the mere presence or elimination of all violations. Even the most effective programs **cannot** produce zero violations. Drivers and carriers make mistakes, but not every mistake should be viewed as a deficiency in the system. The correct approach should be to look at the system in its entirety. For instance, it should be noted how a carrier deals with persistent HOS offenders and the steps the carrier takes to correct mistakes. FHWA should consider how often the motor carrier checks and corrects its procedures for verifying HOS. Moreover, it should be noted if and how the motor carrier corrects its operations in order to address and possibly eliminate recurring problems found during log audits. Overall, the self-monitoring system utilized by the motor carrier should not produce critical HOS violations in more than 10 percent of randomly selected RODS. Without an objective measurement, motor carriers will be placed in the untenable position of not knowing if their system is “effective” until the time an inspector is conducting an audit of its operations.

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A second problem in determining effectiveness of a system without benefit of an established threshold is upon whose authority the decision rests as to whether or not a motor carrier's self-auditing system is effective. And, by what criteria is it measured against? A subjective assessment of a self-monitoring program leaves the motor carrier vulnerable to individual personalities, perceptions and biases. Inspectors would have far too much discretion to impose their idea of an "effective" system upon a motor carrier. Therefore, FHWA must take action to institute an objective measurement criterion.

If FHWA decides not to institute an objective measurement for "effectiveness," then the administration needs to centralize the decision-making process within the agency. This would be necessary to "level the playing field" and promote consistency in enforcement. By placing this authority with the Director, Office of Motor Carrier Field Operations, and taking it out of the hands of individual inspectors, FHWA would assure uniformity in the definition of "effective." However, we urge FHWA to institute an objective, performance-based measurement against which self-monitoring systems will be measured in order to avoid the need for such a centralized decision-making process.

VIII. FHWA NEEDS TO BETTER DEFINE "SUPPORTING DOCUMENT"

In the Act, Congress defined "supporting document" as "any document that is generated or received by a motor carrier or commercial motor vehicle driver in the normal course of business that could be used, as produced or with additional identifying information, to verify the accuracy of a driver's record of duty status." FHWA attempted to clarify this definition by providing an extensive list of examples of supporting documents in its Regulatory Guidance to section 395.8, Question 10. However, FHWA only added to the confusion and placed additional collection burdens on motor carriers when they stated in Question 10: "Supporting documents may include other documents which the motor carrier maintains and can be used to verify information on the driver's record of duty status. If these records are maintained at locations other than the principal place of business, but are not used by the motor carrier for verification purposes, they must be forwarded to the principal place of business upon a request by an authorized representative of the FHWA or State official within 2 business days." Combined, the definition and guidance are all too encompassing and have created confusion in the industry as to which records are clearly eligible for verification purposes. This

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confusion places motor carriers at a severe disadvantage when setting up their system for HOS and RODS verification because not all records retained by motor carriers that contain date and time information are accurate or useful.

Congress acknowledged the fact that all records that could be viewed as useful in verifying RODS are not accurate. Senator Exon, in his statement to Congress said, “The documents retained under this provision can help verify logbook entries, corroborating the time, date, and location of a driver or serve as evidence which disproves the accuracy of logbook entries. Of course, the time, date, and location on a receipt, phone bill, or toll stub is only as accurate as the accuracy of the issuer (emphasis added)” (Congressional Record - Senate, August 11, 1994). The industry agrees with Senator Exon and recognizes that all documents produced in the normal course of business should not or could not be used to verify drivers HOS and RODS. And, this is regardless of whether the records are produced internally or externally, are kept for tax or other purposes, or contain date, time, and location information.

One example of a carrier-produced internal document is the dispatch record. This record is used by the company to track the driver’s movement during the day, but it is only accurate to a point. The dispatch record does not pinpoint the driver’s location. For instance, this record is accurate only to the time a driver actually reports to the dispatcher. This may be within minutes or hours of actual arrival or departure at a delivery or pick-up point. The lack of precision with this record is caused by a number of factors including a driver’s inability to leave the vehicle and reach a telephone or the complete lack of a telephone at a delivery or pick-up point. While this dispatch log is an important tool for the dispatcher, it is not a record that could be utilized, in its present form, to verify RODS. Therefore, although it is a record used by the motor carrier for “customary purposes,” the dispatch record is not a useful record for verification.

Because of the nature and intentional use of this record, it is doubtful that the motor carrier retains the dispatch record for any period of time longer than for the purpose of assisting the dispatcher in vehicle and load assignment. Moreover, it is very unlikely that **carriers** would be able to modify dispatch, and similar records, in order to utilize them for HOS and RODS verification purposes.

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Many motor carriers have established HOS and RODS verification systems and have learned through trial and error which documents are the most accurate indicators of a driver's activity. For FHWA to impose the requirement to collect all documents, some useless and inaccurate such as pre-stamped toll receipts, fuel receipts, and roadside inspection reports, is an unusually burdensome task. And, it is equally troubling to think that FHWA inspectors will continue to utilize these documents to verify HOS and RODS and take enforcement action against carriers when discrepancies arise. Therefore, FHWA must allow motor carriers, whose years of experience have gleaned the "good" from the "bad" records, to determine which documents best fit their operations and verification procedures, and not require collection of all documents that "could be used" to verify HOS and RODS. In order for this change to be made, the phrases "could be used" and "may be used" in the present definition and regulatory guidance must be replaced with the phrase "are used."

IX. RECORD SAMPLING DURING COMPLIANCE REVIEWS SHOULD BE PERFORMED USING STATISTICALLY SIGNIFICANT METHODS

Once a motor carrier institutes a self-monitoring system, FHWA should not implement an enforcement policy that requires or allows an investigator to access a carrier's self-audit reports at the outset of a compliance review (CR). It is unfair to a carrier to hand over to the investigator, at the beginning of a CR, a list of HOS violations uncovered during the carrier's self-audit process. If such a list of violations reflected that just a few drivers were found by the carrier to have HOS or RODS violations, under current CR procedures the investigator would undoubtedly focus his/her review on the RODS for those drivers. This approach would clearly bias the outcome of the CR, and undermine the purpose of having an objective standard for determining the effectiveness of a carrier's system. Self-audit reports should be made available to the investigator **after** completion of that portion of the investigation to the extent permitted by law, and then only for the purpose of corroborating information discovered, or to determine what actions the **carrier** may have taken as a result of the discovered non-compliance.

Of course, we are not proposing that investigations be conducted under adversarial conditions. ATA always advocates that carriers cooperate with an authorized representative of the FHWA, or an appropriate state enforcement agency. However, FHWA should not expect motor carriers to provide

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potentially incriminating information without being afforded the opportunity for a fair and unbiased audit.

ATA has strongly encouraged FHWA in numerous tilings to institute a fairer and more representative approach to record selection during compliance reviews (see ATA comments to FHWA NPRM Docket No. MC-94-22, and the ATA Litigation Center's Petition dated February 7, 1997). In the context of this supporting documents proposal, we again urge FHWA to view the CR process as a means to determine the overall safety compliance posture of a motor carrier, and not simply as a means to determine whether there are violations which should result in enforcement action, In the final outcome of this rulemaking, because of the potential for self-incrimination, no requirement to provide self-audit reports to investigators should be included under any circumstances.

XI. OTHER RELATED ISSUES

A. FHWA Needs to Adjust the Retention Period for Supporting Documents and RODS

ATA supports FHWA's suggestion to seek legislation to eliminate the specified time period of 6 months to a less definitive length of time RODS and supporting documents have to be retained. As it is impossible to forecast what future HOS rules hold - prescriptive rules or rules allowing the use of fatigue management systems or some combination thereof - FHWA must be given the latitude to adjust document retention requirements to match future HOS and RODS requirements. Merely seeking a reduction from 6 months to 4 months does not provide the flexibility that will be needed to administer future HOS and/or RODS verification programs.

B. FHWA's Proposal Favors Use of Electronic Records Systems

The proposed rulemaking clearly favors the use of electronic records systems. FHWA's proposal to either implement a "self-monitoring system" or collect all potential supporting documents, virtually forces a motor carrier to seriously consider the installation of an electronic records system. While satellite systems are utilized by motor carriers today, they are more focused on load and vehicle management instead of the management of HOS. And while there is a trend towards expanded use in the future, as clearly witnessed by the pilot project being conducted with Werner Enterprises and FHWA, no mandate to use these systems for HOS and RODS verification

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should be imposed due to the costs associated with conversion of existing systems and other factors. FHWA should seriously consider ATA Chairman Edward R. Trout's following statement regarding the use and mandating of advanced technologies before deciding the future direction of HOS and RODS verification.

“Greater reliance on technology is undoubtedly the wave of the future in the trucking industry. A significant number of motor carriers have already purchased land- or satellite-based vehicle tracking systems that improve safety, efficiency, and productivity. And more carriers will invest in those technologies unless government, through overzealous enforcement and misguided policies, creates a disincentive for their purchase and use.” (Statement of ATA Chairman Edward R. Trout on FHWA's Agreement to Allow Werner Enterprises to Switch to “Paperless” Logs, ATA News, June 10, 1998)

Use of satellite technology, global positioning, laser technology, or other advanced intelligent systems should be left to the discretion of the motor carrier. Not every carrier has the need for such a system or the resources to equip its fleet. Additionally, these technologies are only beginning to show promise as a tool in driver and fleet management. The agency must bear in mind that more than 70 percent of the trucking industry operates fewer than 10 trucks.

Until these systems are completely integrated into motor carrier operations, FHWA should look at them as only a part of an overall management system. Special attention should not be given to these systems as possible targets for gaining supporting information on drivers' HOS. This would clearly discourage the voluntary adoption of the technology. Motor carriers should be given the option of choosing whether or not information collected in these systems will be included in their overall self-monitoring system. Moreover, once an “effective” self-monitoring system is defined, motor carriers should have the ability to either include, or not, their intelligent system in their self-monitoring system without fear of FHWA insistence that it be included.

C. FHWA Should Consider Other Methods of Collection and Verification

FHWA should consider alternatives to the proposed self-monitoring system. In fact, FHWA is in the process, along with Werner Enterprises, of evaluating the effectiveness of a satellite-based electronic monitoring system. Werner Enterprises' system uses satellite-based electronic communications and self-monitoring for the purpose of driver management and HOS compliance. While advanced in comparison to other systems in use today, Werner Enterprises' system is still in

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the experimental phase. FHWA should continue to work with Werner Enterprises and other interested motor carriers that volunteer in developing intelligent systems tailored to effectively manage driver fatigue. ATA Chairman Edward R. Trout cemented this position when he stated:

“We applaud FHWA for taking a step in the right direction by allowing Werner Enterprises to test this innovative approach to regulatory compliance. ATA has long supported the voluntary use of electronic technology to improve highway safety, and this agreement is fully consistent with that principle. However, ATA strongly opposes any government mandate that carriers retain and submit such data to verify compliance with FHWA regulations.” (Trout, June 10, 1998)

In addition to experimentation with electronic monitoring systems, FHWA should be looking into the use of other electronic information production, storage, and retrieval systems. Many toll facilities are instituting use of “smart cards” and “smart pass” systems that do away with paper toll receipts. Shippers transfer information about their shipments directly from their computers to the carrier’s computer, eliminating the need for paper. And, drivers “talk” to their dispatchers through in-cab computer terminals without ever saying a word. All of these “paperless” systems should be viewed by FHWA as integral parts of a total advanced self-monitoring system in an effort to eliminate the need to accumulate thousands of pieces of paper. We urge FHWA to allow motor carriers to use any intelligent transportation system technology developed now or in the future in the manner and to the extent it is effective for HOS and RODS verification if the system is capable of meeting the “effectiveness” standard previously discussed.

D. FHWA Should Increase Driver Responsibility

The FHWA believes that drivers have an obligation not only to comply with the HOS and RODS requirements, but also to cooperate with their motor carrier employers by collecting and submitting the supporting documents needed to verify compliance with the rules. In cases where motor carriers would not institute self-monitoring systems, FHWA is proposing to require drivers to submit supporting documents to the motor carrier at the time the corresponding RODS are submitted.

In order to make this requirement effective, drivers should be held responsible and accountable for accumulating supporting documents, and for providing them to the motor carrier. In many instances, drivers are on their own for days and weeks at a time. The only real control that a motor carrier has over its drivers is that they must travel where told and arrive at their destinations

**FHWA DOCKET MC-98-3706: HOURS OF SERVICE OF DRIVERS;
SUPPORTING DOCUMENTS NOTICE OF PROPOSED RULEMAKING**

when required. Otherwise, many motor carriers must rely on their drivers to obey the Federal Motor Carrier Safety Regulations, including compliance with the HOS.

Motor carriers must rely upon the driver to accumulate receipts and other paperwork necessary to document HOS compliance and entries in the RODS. If the driver fails to acquire these documents, then the driver should be held responsible for that failure by FHWA and state inspectors. This is especially true if it is found that the motor carrier has addressed the importance of recordkeeping with its drivers and takes actions against offenders. Without accountability, recurrent offenders have no reason to change their method of operation and motor carriers will continue to pay for their actions.

E. FHWA Needs to Further Study the Independent Contractor and Toll Receipt Issue

We recognize the necessity for a motor carrier to have the ability to collect supporting documents for HOS and RODS from independent contractors. We also recognize Congress' intent to facilitate Federal and State enforcement efforts to document violations of the HOS regulations. However, it should not be forgotten that independent contractors are independent business men and women who operate their own business enterprises and who often need to maintain original documentation for tax and other purposes.

FHWA needs to research further the implications of requiring independent contractors to hand over original documents to motor carriers that are generally retained by the independent contractors. Other laws (related to, for example, federal and state income taxes and workers' compensation payments) may require the independent contractors' businesses to retain those original documents, putting the independent contractors in an untenable position.

Further, although an FHWA mandate in this area could not be properly viewed as having any legal effect on independent contractor status, it could be mistakenly cited in a challenge to a contractor's independence. Consequently, in formulating any requirements in this area, FHWA needs not only to be sensitive to the needs of independent contractors as separate business persons, but also should minimize its intrusion into motor carrier/independent contractor business relationships so as not to precipitate confusion about contractor status.

XII. CONCLUSION AND RECOMMENDATIONS

In summary, ATA supports FHWA's conceptual approach to this rulemaking. Motor carriers should have the ability to institute individualized self-monitoring systems that assist them in managing fatigue. However, the proposal is premature. We recommend that FHWA:

1. Combine this rulemaking with the upcoming NPRM on HOS.
2. Define an "effective" self-monitoring program as one that prevents critical HOS violations in 90 percent of randomly selected and audited RODS.
3. Define the person who makes the determination of "effective" as the Director, Office of Motor Carrier Field Operations, in the event an objective measurement for an "effective" program is not defined.
4. Modify the requirement to document beginning, intermediate, and ending times in all cases.
5. Increase driver responsibility for collecting and submitting supporting documentation.
6. Research further the feasibility and legalities of having independent contractors turn over all receipts to the motor carrier under the "exception" to the self-monitoring program.
7. And, sample records during compliance reviews using a statistically significant method.

ATA appreciates the opportunity to comment on this rulemaking and looks forward to seeing a new, more cost-effective proposal on supporting documents merged with the upcoming NPRM on HOS.

ATTACHMENT A:

ATA RESPONSE TO OMB COLLECTION OF INFORMATION 2125-0016

AMERICAN TRUCKING ASSOCIATIONS



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May 22, 1998

Ms. Victoria Wassmer
Desk Officer for FHWA
Office of Information and Regulatory Affairs
Office of Management and Budget
Room 10235
New Executive Office Building
Washington, DC 20503

Re: Hours of Service of Drivers; Supporting Documents
Docket No. FHWA-98-3706

Office of Management and Budget Collection of Information
2125-0016

Dear Sir or Madam:

The American Trucking Associations, inc. (ATA), with offices located at 2200 Mill Road, Alexandria, Virginia 22314, is the national trade association of the trucking industry. Through our affiliated trucking associations located in every state and the District of Columbia, and their more than 30,000 motor carrier members, fourteen affiliated conferences, and other organizations, the ATA federation represents every type and class of motor carrier operation in the country, both for-hire and private.

ATA files this letter on behalf of the federation in response to the Federal Register Notice of Proposed Rulemaking (NPRM), April 20, 1998 Volume 63, No. 75; Department of Transportation, Federal Highway Administration (FHWA) regarding Hours of Service of Drivers; Supporting Documents. Specifically, this letter will address the issues raised in the section of the NPRM titled: **New Information Collection Proposal.**

ATA is deeply concerned that FHWA has substantially understated the recordkeeping burden associated with its proposal to revise the supporting documents rule. As discussed in more detail below, FHWA has unreasonably assumed that the rule will impose essentially no additional burden on most motor carriers. This is demonstrably wrong.

FHWA states that this proposed rule would require motor carriers to develop and implement an effective self-monitoring system that audits supporting documents and compares them to records of duty status (RODS). If carriers do not implement a self-monitoring system, FHWA would require motor carriers to "obtain and retain every (emphasis added) document that the carriers or their drivers generate or receive in the normal course of business that would accurately support their beginning, intermediate, and ending times of each driver's daily trips in interstate commerce." (63 Fed Reg. 19464). These documents would have to contain the driver's name or vehicle number and reasonably reliable references to date, time, and location in order to corroborate the information on the RODS.

In analyzing the paperwork burden which would be produced by the proposed rule, FHWA asserts that every document that is generated and received by a motor carrier or commercial motor vehicle driver during the normal course of business is used or retained by the motor carrier "for usual and customary purposes" and therefore, should not be considered to be a burden for purposes of 5 CFR 1320.3(b).

This assumption is wrong because regardless of the method used to verify RODS, motor carriers will be required to: 1) amend current documentation; (2) create new documentation; (3) retain more records for longer periods of time than is currently customary; and (4) generally overhaul their present systems in order for them to comply with the requirement to document beginning, intermediate, and ending times.

Every motor carrier or driver-generated document that indicates time and placement of the driver is not used for "usual and customary purposes." Certain companies generate internal documents for tracking the progress of drivers during the day, but these documents are only accurate to a point. They do not pinpoint the driver's location. For instance, some internal reports used for dispatching are only accurate to the time a driver actually reports to the dispatcher. This may be within minutes or hours of actual arrival or departure times at a delivery or pick-up point. The lack of precision with such records is caused by a number of factors including a driver's inability to leave the vehicle and reach a telephone or the complete lack of a telephone at the delivery or pick-up point. While these "dispatch logs" are an important tool for the dispatcher, they are not records that could be utilized, in their present form, to verify RODS. Therefore, although it is a record used by the motor carrier for "customary purposes," FHWA may take the position that the company would have to modify the form and the way it is used in order for the dispatch record to be utilized for RODS verification purposes.

Because of the nature and intent of this record, it is doubtful that the motor carrier retains this particular document for any period of time longer than for the purpose of assisting the dispatcher in vehicle and load assignment. Moreover, it is

very likely that carriers are unable to modify these, or similar records, to capture and retain all of the proposed information. But, more onerous is the inference in the proposed rule that, if a motor carrier decides to forgo the self-verification system, the carrier would be forced to collect every possible record and retain them for a period of six months, regardless of their intended useful life.

The dispatch log is but one example of records used by motor carriers that would have to be modified in order to verify either beginning, intermediate, or ending times for drivers. Preliminary talks with motor carriers have revealed that there are as many problems with identifying exact beginning and ending times as there are in verifying intermediate times through the use of existing company or driver-generated documents. Additionally, because of the proposed requirement to have every supporting document contain certain driver and vehicle information, time will have to be spent by the driver entering this information on current and newly designed or designated supporting documents. Because of this, ATA feels that FHWA has overlooked a large portion of the verification process by not considering modification of existing records for verification purposes. Therefore, the estimate of 949,500 burden hours for the first year, and only 17,737 for the second and subsequent years, is flawed for several reasons.

First, the estimate of 949,500 burden hours $[442,000 \text{ known motor carriers} \times .75 \text{ (percentage of motor carriers utilizing paper logs)} \times 3 \text{ hours to develop}]$ only takes into consideration development of the plan describing the self-monitoring system. As explained previously, the written plan is only part of the burden the development of new systems or the potential, substantial modification of existing documentation and systems within the company must be considered.

Second, FHWA states that, "most motor carriers choose to fulfill their responsibilities for highway safety by auditing and comparing their RODS and supporting documents to determine whether drivers have made false reports on their duty activities." This belief leads FHWA to suggest that the "time necessary to audit and compare RODS and supporting documents does not need to be included in the burden estimate." Most motor carriers do indeed collect supporting documents, such as toll and fuel receipts, roadside inspection reports, and, in some cases, pick-up and/or delivery receipts to verify RODS. However, most of these records verify some intermediate time during the course of a trip, and not beginning or ending times. As stated previously, delivery and/or pickup times can be misleading, depending on when the driver was finally able to load or unload the vehicle, obtain a signature on the paperwork, and then call in for the next assignment. This proposal would not only require carriers to attempt to develop new systems, or substantially alter existing systems, but it would also add more time to the self-auditing process. We suggest

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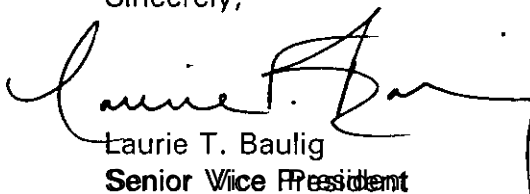
that it would, at a minimum, double the amount of time drivers currently spend collecting and recording required information on various documents and the time carriers spend implementing new auditing and verification processes.

Third, FHWA suggests that 50 percent of the written plans would have to be amended each year. Additionally, FHWA estimates that there will be an additional 1 percent of new carriers having to develop plans. Both amendment and modification are expected to place 3 burden hours on affected motor carriers. Based on these FHWA assumptions, 17,737 burden hours for subsequent years is very low. Utilizing FHWA's assumptions, this number is at least 645,660 hours $[422,000 \times .50$ (number of motor carriers estimated to require plan amendments) + 422,000 X .01 (number of new carriers each year that must develop a plan) X 3 hours to develop/amend the plan].

ATA urges FHWA to reexamine its assumptions on the amount of time and effort needed to develop, implement, follow and maintain a self-monitoring program, as currently proposed, for RODS. And, ATA strongly suggests to OMB that FHWA's burden estimates are based on faulty assumptions causing the agency to substantially underestimate the burdens on the motor carrier industry.

ATA appreciates this opportunity to comment on this matter and will submit, in writing, further comments to the docket regarding other issues presented. Should you have any questions regarding this letter, please contact our Safety Policy Department at: 703/838-1 847.

Sincerely,



Laurie T. Baulig
Senior Vice President
Policy and Regulatory Affairs

cc: Mr. Ed Clark, Economist
Office of Information and Regulatory Affairs
Office of Management and Budget

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